IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1981, c. 53, as amended, ss. 4(1), 4(2), 6(2), 8 and 10,

AND IN THE MATTER OF KAREN YOUMANS AND LILY CUPS INC., MAC ALAM AND TOM DOWKER.

Interim Decision.

At issue is the complaint by Ms Karen Youmans, dated July 11, 1986, in which she alleges that she was discriminated against by her employer Lily Cups Inc., and its employees Alam and Dowker, in that her rights under the above-named sections of the *Ontario Human Rights Code* (the "Code") were infringed upon.

A preliminary hearing was held on September 10, 1990 for the purpose of dealing with a request by the Ontario Human Rights Commission ("Commission" or "OHRC"), which carries the complaint. The Commission asked the Board of Inquiry to order the production of certain documents by respondent Lily Cups Inc. ("Respondent"). After hearing oral arguments on the matter the Board requested written submissions.

Complainant Youmans states that she was hired as a packer by Respondent in November 1984, was later advanced to serviceperson. Subsequently, however, she was demoted again, and after her request for restoration to her previous level of employment was denied she resigned and filed her complaint. She charges that she was harassed and that she was discriminated against as a woman. It is the latter charge which forms the issue in this preliminary argument.

At the time of the investigation an officer of the Commission made an analysis of about half the employees' files (all names from A to M). A number of test scores, to determine an employee's mechanical aptitude, were found in the men's files but none in the women's. While Complainant had also taken a test in order to advance to serviceperson, her score (like those of all other women) was not located. The investigating officer requested additional information in order to determine the validity of the testing procedure, but Respondent's counsel refused that request at the time. However, the Commission undertook no further steps to enforce production of such documents, as was its right under s. 32 of the *Code*.

The Commission states that no more than ten women took the mechanical aptitude test during the time of complainant's employment, and that it would not be onerous for Respondent to produce their scores at this time.

It further appears to submit (in ¶ 10) that an analysis of all women's test scores be produced, in order to establish how they fared as a result of their examination. It argues that these results are relevant in order to sustain the charge that women in general and Complainant in particular were discriminated against on the basis of their sex. The Commission wishes to compare these test scores with the men's and hopes thereby to confirm its charge of discrimination. It further states that its request for these documents satisfies the requirements of the *Statutory Powers Procedure Act* (" *SPPA* "), R.S.O. 1980, c. 484, ss. 12(1) and 15 (1), in that the documents have been defined with sufficient particularity and their production would not prejudice Respondent.

Respondent has agreed to provide the Commission with Complainant's test score, if located, but has refused to go any farther and claims that legal precedents argue against an order of producing documents which were accessible to the OHRC at the time of its investigation. An order by this Board, so it says, would reopen the investigation, and neither the *Code* nor the *SPPA* contemplate such an order once the Board has been appointed.

In support, Respondent counsel cited the decision of Chairman Cumming in *Rydman v. Board of Commissioners of Police of the Town of Kenora* (1987) 8 C.H.R.R. D/4138. he Board said (at ¶ 3296):

> Nor is a board of inquiry empowered to compel the production of documents prior to a hearing, that is, at a discovery stage, by any provision of the *SPPA*, R.S.O. 1980, c. 484. Paragraph 12(1)(b) and section 15 of that *Act* empower a board of inquiry to compel "at a hearing" documents "relevant to the subject matter of the proceedings," provided they are not inadmissible by reason of privilege or statute. The Board must then determine whether the document meets the test of s. 15 of the *SPPA*.

I agree with this judgment and, for the purpose of this preliminary decision, could conclude by advising the Commission to wait until testimony

is called and then proceed to ask for a subpoena *duces tecum*, in accordance with the cited provisions of the *SPPA*.

But since this case has already suffered long delay it seems to me that it is in the interest of all parties to advise them of the likely course which such a motion would take.

The *SPPA* cannot be seen as a law standing by itself, for its rules are generally meant to facilitate the execution of other legislation. In the instant case that legislation is the *Code*, and when a document is asked for through a subpoena *duces tecum* it must meet the test of both the *SPPA* and of the *Code*. That qualification has been explored by Prof. Hunter in *Joseph v. North York General Hospital et al.* (1982) 3 C.H.R.R. D/854. At ¶ 7584 to 7587 the Board stated:

> Once the Minister has appointed the Board of Inquiry, the *Code* is silent on disclosure or discovery requirements. In my opinion, this was not legislative omission but rather a deliberate recognition that adequate provision had already been made for compelling disclosure at an earlier (i.e. pre-Board) stage.
>
> Investigation of human rights complaints is frequently involved and protracted. In the instant case twenty-one months elapsed between the filing of the initial complaint and the appointment of the Board by the Minister. That is sufficient time for the Commission to compel production.
>
> In my opinion, it would be unproductive and contrary to the legislative intention to countenance further delay while the parties seek additional disclosure and discovery of documents.
>
> Once the Board of Inquiry is appointed, it is assumed that the Commission has conducted a full, thorough and informed investigation of all the relevant facts.

I find this argument compelling. The power of a subpoena *duces tecum* should not be used as a device to achieve during the hearing what the Commission should have achieved at an earlier stage. See also the decision by Chairman Gorsky in *Guru v. McMaster University* (1981) 2 C.H.R.R. ¶ 2185; as well as the admonition by Mr. Justice Blair of the Ontario Court of Appeals in *Corporation of the City of Toronto v. C.U.P.E. Local 79* (reasons for judgment of March 2, 1982, unreported, cited by Chairman

Hunter). In addition, I note that in the instant case the time lapse between the filing of the complaint and the appointment of the Board was even greater, some forty-eight months.

Of course, this restriction does not categorically rule out any subpoena *duces tecum* that may be requested at a later stage of the hearings. But it will have to be shown that it is not a substitute for the shortfall of the Commission's earlier investigation. It will have to relate not to discovery but to evidence or to circumstances which are of a nature that were not apparent at the time of the investigation.

I must, however, ask how such a restricted course of procedure will affect the complainant. Under the law a complaint to the Commission was the only way by which Ms Youmans could seek redress, and the failure of the Commission to proceed in the manner which it now and belatedly chooses should not close off her chances to prove her case. The *Code* was created as an avenue to safeguard her rights if at all possible, though that intention must be balanced against the rights of the Respondent. In addition, there is also the right of the public which has a stake in seeing that justice is executed without unnecessary further delay. How may this triple balance be achieved in this instance?

The complaint relates first and foremost to matters of personal interrelations which fall under the rubric of harassment. Her allegations in this respect are not touched by closing off further avenues of discovery.

As to the latter, Respondent has already volunteered to obtain her particular test scores which might then be compared to those of the male workers, and might conceivably establish that she was discriminated against as a female.

I am not sure what the test scores of the ten women will show who are said to be the only women advanced to the position of serviceperson. But while I cannot order the production of these scores at this time, I must take into consideration the obstructive comportment of Respondent at the time when these and/or other documents were asked for by the investigating officer. To be sure, the Commission thereupon had the right of asking for a search warrant, but chose not to go that route. There may have been good reasons for that, for the invoking of a warrant is a highly intrusive matter which is often met with resentment and further

obstruction. I would therefore be willing to consider asking for these ten test scores, for their production cannot be said to be onerous.

Therefore, while it is possible to wait until the motion is actually made during the hearing, I would ask Respondent to produce them voluntarily now. If there is some doubt on the part of Respondent that a public exhibition of these scores may be prejudicial to certain individuals I would receive them *in camera* -- a method adopted in *Rydzman* (see ¶ 32694).

On the basis of arguments presented at this stage, and in the interest of expediting a case that has already lasted long enough, I will not order other requested documents to be produced for discovery, but will expect Respondent to furnish Complainant's test score as well as the test scores of the ten women referred to above.

Toronto, 24 September 1990

W. GUNTHER PLAUT
CHAIR, BOARD OF INQUIRY